

## Regulatory Requirements for TAS Eligibility Under the Clean Water Act Water Quality Standards and Certification Programs and Examples of Supporting Documentation

The information below identifies the regulatory requirements the U.S. Environmental Protection Agency considers in assessing a federally recognized Indian tribe (tribe or tribal) eligibility for treatment in the same manner as a state (TAS) under the Clean Water Act (CWA) water quality standards (WQS) and certification programs set forth in 40 CFR 131.8 and 131.4(c) and provides examples of documentation that has been provided by tribes to meet those requirements.<sup>1</sup>

Regulatory Provision	Examples of Documentation
<b>1) The Indian tribe is recognized by the Secretary of the Interior and exercises governmental authority over a reservation.</b> 40 CFR 131.8(a)(1); 131.3(k) and (l). <b>An application must include a statement that the tribe is recognized by the Secretary of the Interior.</b> 40 CFR 131(b)(1).	The Secretary of the Interior publishes in the <i>Federal Register</i> (FR) a list of federally recognized Indian tribes. See <a href="http://www.usa.gov/Government/Tribal_Sites/">http://www.usa.gov/Government/Tribal_Sites/</a> . Applicants often submit a recent copy of the FR list to establish that the tribe has federal recognition.
<b>2) The Indian tribe has a governing body carrying out substantial governmental duties and powers.</b> 40 CFR 131.8(a)(2). <b>An application must include a descriptive statement demonstrating that the tribal government is carrying out substantial governmental duties and powers over a defined area.</b> 40 CFR 131.8(b)(2). <b>The statement should:</b>	
<ul style="list-style-type: none"> <li>• <b>Describe the form of the tribal government.</b> 40 CFR 131.8(b)(2)(i).</li> </ul>	Applications discuss the organizational structure of the tribe and identify and describe the entities that exercise the executive, legislative, and judicial functions of government.
<ul style="list-style-type: none"> <li>• <b>Describe the types of governmental functions currently performed by the tribal government, such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, or welfare of the affected population, taxation, and the exercise of eminent domain.</b> 40 CFR 131.8(b)(2)(ii).</li> </ul>	Applications discuss specific regulatory, legislative, executive and judicial activities the tribe undertakes, including actions to exercise its police power to protect the environment, e.g. establishing regulatory programs or carrying out permitting and enforcement activities.
<ul style="list-style-type: none"> <li>• <b>Identify the source of the tribal government's authority to carry out the governmental functions currently being performed.</b> 40 CFR 131.8(b)(2)(iii).</li> </ul>	Applications identify sources of the tribal government's authority, which may include oral or written tradition, an oral or written tribal constitution, tribal ordinances, codes, by-laws, charters, and resolutions, relevant provisions of federal treaties, executive orders or statutes, etc.

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<sup>1</sup> If information or a document is provided for one purpose, it need not be reproduced again for other purposes, as long as it is identified and explained. Where a tribe has previously qualified for TAS for another CWA program or Safe Drinking Water Act program, it need only submit the required information not previously provided. See 40 CFR 131.8(b) (6).

## Attachment B

Regulatory Provision	Examples of Documentation
<p><b>3) The WQS program to be administered by the Indian tribe pertains to the management and protection of water resources that are within the borders of the tribe's reservation. 40 CFR 131.8(a)(3). An application must include a descriptive statement of the Indian tribe's authority to regulate water quality. 40 CFR 131.8(b)(3). That statement should include:</b></p>	
<ul style="list-style-type: none"> <li>• <b>A map or legal description of the area over which the tribe asserts authority to regulate surface water quality. 40 CFR 131.8(b)(3)(i).</b></li> </ul>	<p>Applications include maps showing the area and water resources over which the tribe asserts authority. Some tribes provide maps based on an official survey by the U.S. Department of the Interior or an official map of the reservation prepared by the Bureau of Indian Affairs. A written legal description discusses with some specificity the locations of the boundaries of the reservation areas over which the tribe asserts authority.</p>
<ul style="list-style-type: none"> <li>• <b>A statement by the tribe's legal counsel (or equivalent official) that describes the basis for the tribe's assertion of authority, and that may include a copy of documents such as tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions that support the tribe's assertion of authority. 40 CFR 131.8(b)(3)(ii).</b></li> </ul>	<p>Legal counsel statements identify and discuss the legal basis for the tribe's assertions of authority over areas/waters covered by the application, with special attention to showing the tribe has jurisdiction over nonmember activities within the reservation, if applicable. (Attachment C provides more information about how EPA addresses the jurisdiction of tribes over nonmember activities.) Statements may provide land ownership information, including maps and summary information on tribal trust, Indian trust, Indian fee, nonmember fee, and other types of land status or ownership. Statements summarize information within relevant provisions of listed documents and explain how the documents support the tribe's assertion of authority.</p>
<ul style="list-style-type: none"> <li>• <b>An identification of the surface waters for which the tribe proposes to establish water quality standards. 40 CFR 131.8(b)(3)(iii).</b></li> </ul>	<p>Applications identify rivers, lakes, reservoirs, tidelands, wetlands, or other surface waters for which the tribe is proposing to establish water quality standards and may include a map that shows the locations and configurations of those waters. Where a tribe has been developing water quality standards, the application may use information from that effort to identify covered surface waters.</p>

Regulatory Provision	Examples of Documentation
<p><b>4) The tribe is reasonably expected to be capable of administering an effective WQS program. 40 CFR 131.8(a)(4). The application must include a narrative statement describing the tribe's capability to administer an effective program. 40 CFR 131.8(b)(4). The narrative statement should include:</b></p>	
<ul style="list-style-type: none"> <li>• <b>A description of the tribe's previous management experience, which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.), the Indian Mineral Development Act (25 U.S.C. 2101 et seq.), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a). 40 CFR 131.8(b)(4)(i).</b></li> </ul>	<p>In addition to experience with the federal programs listed in the regulation, tribal applications may also discuss the tribe's previous management experience with its own tribal programs. This discussion need not address environmental program management experience, which is included in the next heading.</p>
<ul style="list-style-type: none"> <li>• <b>A list of existing environmental or public health programs administered by the tribal governing body and copies of related tribal laws, policies, and regulations. 40 CFR 131.8(b)(4)(ii).</b></li> </ul>	<p>Applications describe a tribal air, water, or waste management program, or any other environmental or public health programs administered by the tribe, as well as tribal experience with resource management, including forestry and fisheries. Relevant documents include copies or summaries of tribal laws and regulations governing the described program(s). A tribe is not required to have experience in administering environmental programs, but a tribe with such experience may wish to provide such information.</p>
<ul style="list-style-type: none"> <li>• <b>A description of the entity (or entities) that exercise the executive, legislative, and judicial functions of the tribal government. 40 CFR 131.8(b)(4)(iii).</b></li> </ul>	<p>Applications describe the tribal governmental system. This information may overlap with or duplicate information about the tribal governmental structure and functions discussed under 40 CFR 131.8(b)(2)(i) above, and a tribe may refer to, rather than repeat, that information.</p>
<ul style="list-style-type: none"> <li>• <b>A description of the existing, or proposed, agency of the tribe that will assume primary responsibility for establishing, reviewing, implementing, and revising water quality standards. 40 CFR 131.8(b)(4)(iv).</b></li> </ul>	<p>Applications describe the tribe's environmental management program. Before a tribe can be authorized to issue water quality certifications, 40 CFR 121.1(e) requires that it identify the tribal entity that will be responsible for conducting water quality certifications under CWA § 401.</p>
<ul style="list-style-type: none"> <li>• <b>A description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan that proposes how the tribe will acquire additional administrative and technical expertise. The plan must address how the tribe will obtain the funds to acquire the administrative and technical expertise. 40 CFR 131.8(b)(4)(v).</b></li> </ul>	<p>Applications describe the qualifications of tribal staff, including resumes. Position descriptions are also useful documentation, since individual staff may change in future years. Or an application may include a plan that describes how the tribe will acquire the needed expertise to operate an effective program and how it will obtain the funds required to develop technical and administrative expertise. Evidence of management of previous EPA financial grants may be included. A tribe may choose, but is not required, to submit draft water quality standards as part of the showing of capability.</p>

## Attachment B

Regulatory Provision	Examples of Documentation
<b>5) Additional documentation required by EPA that, in EPA's judgment, is necessary to support a tribal application.</b> 40 CFR 131.8(b)(5).	Additional documentation from a tribe when needed to clarify or supplement the application.